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in the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM JOSEPH HARVEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

August 27, 1986

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QUESTIONS PRESENTED

On October 20, 1980, the Government sought and obtained a Federal bug order under Title III of the 1968 Crime Control Act (18 U.S.C. §2510 *et seq.*) for RICO (18 U.S.C. §1961 *et seq.*) for marijuana, the relevant predicate offenses of which were 21 U.S.C. §§ 841(a), 846, for William Joseph Harvey's office to listen for 30 days. A prior State investigation, which immediately preceded the Federal bug, included a marijuana wiretap and a trash search that implicated Harvey. The Government also knew that Harvey would be out of town on a vacation for an unknown period of time. This information was not revealed to the judicial officer who issued the order. The Federal bug order required progress reports at five day intervals; the agents were instructed to minimize listening to unauthorized conversations, including to stop listening to the bug when named principals were not on the premises. Five progress reports were filed; they indicated no progress over a 21 day period. Neither the Government nor the supervising judicial officer stopped the listening. When Harvey returned from vacation, he was overheard—on November 19th—on the 26th day of the 30 day period. No order of approval for the disclosure of the Federal bug or the State wiretap was obtained by the Government before Harvey was indicted under 18 U.S.C. §§ 848, 952(a) and 963.

These facts raise these questions:

1. Did the failure of the Government to reveal the prior State wiretap violate 18 U.S.C. §2518(e), which requires an application for a bug to include a "full and complete" statement about "known" previous applications "involving" a person against whom an order is sought?

2. Did the failure of the Government to reveal the prior State wiretap and the trash search violate 18 U.S.C. §2518(1)(c), which requires an application for a bug to include a "full and complete" statement about "other investigative procedures"?

3. Did the failure of the Government to reveal that Harvey was out of town violate 18 U.S.C. §2518(1)(b), which requires an application for a bug to include a "full and complete" statement of "belief" about "probable cause"?

4. Did the failure of the Government or the supervising judicial officer to stop the listening after 21 days of no progress violate 18 U.S.C. §2518(6), which provides for "reports . . . showing . . . progress toward the achievement of the authorized objective and the need for continued" listening?

5. Did the failure of the Government to obtain orders of approval for the disclosure of the Federal bug and the State wiretap violate 18 U.S.C. §2517(5), which provides that an "application" must be made for an order of approval to "disclose . . . " a "wire or oral communication . . . relating to offenses other than those specified in the order of authorization . . . "?

6. Did the Government fail to follow the supervising judicial officer's minimization instructions that were required by 18 U.S.C. §2518(5), which provides that an "order" must "contain" a "provision" that listening "shall be conducted . . . [so as] to minimize the interception" of "communications" not "subject to interception"?

7 Did the conduct by the Government of the listening lack a showing of present probable cause, necessity, and particularity, which are required by the Fourth Amendment?

8. Did the failure of the Government to reveal to the supervising judicial officer the prior State wiretap, the trash search and Harvey's absence violate the Fourth Amendment?

9. Does Title III, as interpreted and applied, authorize unreasonable searches and seizures, which are prohibited by the Fourth Amendment?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 789 F.2d 1492. It is reproduced in the Appendix to this Petition at App.pp. 1-51. Harvey's request for a rehearing by the panel or the court en banc was denied; see Eleventh Circuit slip opinion 4519. It is reproduced at App.pp. 52-54. The opinion of the District Court is reported at 560 F.Supp. 1040. It is reproduced at App.pp. 55-160.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1986. Harvey's request for a rehearing was denied on July 25, 1986. This Petition has been filed within sixty (60) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are lengthy. Their pertinent text is reproduced at App.pp. 161-188.

Their citations are:

18 U.S.C. §1961 *et seq.*

18 U.S.C. §2510 *et seq.*

21 U.S.C. §§841(a), 846, 848, 952(a), 963.

STATEMENT OF THE CASE

On February 9, 1982, a twenty-three count indictment was returned in the United States District Court for the Southern District of Florida, in Miami, charging William Joseph Harvey and eighteen co-defendants with violations of 21 U.S.C. §§ 848, 963, 952(a), 846 and 841(a)(1). Harvey and the others filed, on July 7, 1982, a motion to suppress the

evidence obtained from a series of Federal bugs and a State wiretap. After a four day hearing and a one day argument, the United States District Court denied the motion. 560 F.Supp. 1040. Harvey went to trial on a stipulated transcript and was convicted of 21 U.S.C. §846. 789 F.2d 1492. Harvey appealed to the Eleventh Circuit Court of Appeals. His appeal and petition for rehearing were denied. *Id;* slip opinion 4519.

REASONS FOR GRANTING THE WRIT

1. *The Increasing Use And Shifting Character Of Wiretapping And Bugging In The Current Law Enforcement Effort To Control The Drug Traffic Requires The Active Intervention Of This Court To Resolve Conflicting Decisions, To Bring Together Diverging Practices, And To Assure That The System Of Careful Judicial Supervision Mandated By The Constitution And Statutory Law Is Upheld In Practice.*

The Government has launched a "War on Drugs." It is taking place at the Federal, State and local levels. The President has declared, "It's war to the end." *The Washington Post*, Dec. 6, 1984, p.4. Principal battlefields are in South Florida and Latin America. Major weapons in the law enforcement war include wiretapping and bugging. Since 1980, their use has dramatically increased and shifted in character. Increasingly, individuals are subjected to longer periods of more intrusive listening—without a correspondingly heightened judicial supervision, as this petition will demonstrate. As such, a pressing need exists for this Court to intervene to reinvigorate constitutional and statutory safeguards, which are being drained of vitality by law enforcement agents and courts bent on fighting drugs without regard to other values.

Until 1980, the Government operated under an informal limitation of not more than 100 wiretap or bug orders per

year. Today, that figure is almost 2½ times as high.[1] Before 1980, gambling was the principal offense under investigation, the initial period of listening averaged only 21 days, only 25% of the orders were extended, only 65 people were overheard, and as much as 36% of the conversations were incriminating.[2] Today, twice as many orders are issued for drugs as for gambling, the initial period of listening has risen to 25 days, 57% of the orders are extended—the total number of days of listening has almost doubled—105 people are overheard, but only 20% of the conversations are incriminating.[3] In fact, one Federal wiretap lasted an incredible 453 days.[4] The Government, too, is increasingly using bugs as well as wiretaps, and it is placing them in single family dwellings and apartments as well as businesses.[5] If this law enforcement activity were subjected to the sensitive scrutiny of an independent judiciary, it would be no doubt distasteful, but it would be, at least arguably, necessary. Unfortunately, it is both distasteful and, as practiced, unnecessary.

It is too bad, but sometimes the morals of war result in the violations of basic human rights. This petition for certiorari is about one such casualty, William Joseph Harvey. But it raises important questions of conflicting law between the Circuit Courts of Appeal and State appellate courts and divergent practices that transcend the unjustifiable and unjustified invasion of Harvey's privacy in the name of drug control. The enemy in the "War on Drugs" includes not only

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[1] *Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications: Administrative Office of the U.S. Courts*, Table 7 (1986) (hereinafter *Administrative Report*).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 3.

[5] *Id.* at Table 6, Table 7.

people in Latin America, but people in the United States, who are, unlike those in Latin America, protected in basic rights by the United States Constitution and duly enacted legislation. One item of such legislation is Title III of the 1968 Crime Control Act (18 U.S.C. §2510 *et seq.*), which was the product of a careful compromise by Congress of the interests of privacy and law enforcement, the keystone of which was a carefully crafted system of judicial supervision. This petition tests the degree to which that system of judicial supervision can be realized in practice in a time of law enforcement war. It takes the blunt position that without the active intervention of this Court, the promise of the 1968 compromise of a balanced system, which recognized each of the various conflicting values in any scheme of police surveillance in a free society, will not be realized.

This Court has decided seven major decisions under Title III, the most recent of which came in 1978.[6] It is time now to make a comprehensive reassessment of changing law and practice. This Court has the benefit of the American Bar Association Standards on Electronic Surveillance,[7] the empirical work of the National Commission For the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance,[8] and a mature body of legal

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[6] *United States v. United States District Court*, 407 U.S. 297 (1972); *United States v. Kahn*, 415 U.S. 143 (1974); *United States v. Giordano*, 416 U.S. 505 (1974); *United States v. Chavez*, 416 U.S. 562 (1974); *United States v. Donovan*, 429 U.S. 413 (1977); *Scott v. United States*, 436 U.S. 128 (1978); *Dalia v. United States*, 441 U.S. 238 (1978).

[7] *Electronic Surveillance: American Bar Association Project on Standards For Criminal Justice* (1971) (hereinafter *ABA Standards*).

[8] *Electronic Surveillance: Report of the National Commission For The Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance* (1976) (hereinafter *Wiretap Report*).

commentary.[9] The factual and legal record in this legislation has been thoroughly developed by knowledgeable counsel for the Government and Harvey. The issues have been fully briefed and decided on the merits by the lower courts. In fact, this petition raises more—and more substantial—issues under Title III than any previous litigation known to these experienced counsel. The issues, too, are fully ripe for adjudication—and they come at a crucial juncture in the use of wiretapping and bugs by the Government to suppress the drug traffic.[10]

It is doubtful that this Nation can achieve a drug free status through law enforcement alone.[11] It would be a tragedy of the first order, however, if its success in achieving one freedom came at the price of the loss of another freedom. The humor is macabre, but it is sometimes sardonically suggested that all the Government has to do today to win a drug prosecution is show up and say, "Drugs." If the administration of justice in this important area is to be, not only administration, but also justice, it will only come about if this Court reinvigorates and enforces the standards set by the Constitution and the Congress until they are changed by the normal constitutional and legislative processes. The sort of result-oriented fact finding and the similar rewriting of duly enacted legislation that is present in this record must come to an end. What is at stake is no less than the rule of law. This petition offers this Court, in short, a unique opportunity to set the right tone for a *lawful* war on drugs.

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[9]*See, e.g.*, J. Carr, *The Law of Electronic Surveillance* (1977) (hereinafter *Carr*); Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 *Journal of Crim. Law and Criminology* (1983) (hereinafter *Goldsmith*).

[10]While this petition focuses on the Government's efforts, a decision on the merits by this Court will be fully applicable to the thirty-two states, which have enacted State statutes under Title III and which are increasingly using them. *Administrative Report* at Table 1.

[11]*America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime, President's Commission on Organized Crime*, 5-13 (1986).

2. *The Failure Of The Government To Reveal The Prior State Wiretap Violated 18 U.S.C. §2518(1)(e).*

Under 18 U.S.C. §2518(1)(e), an application for a bug must include a "full and complete" statement about "known" previous applications "involving" any of the same persons. Harvey was named in the prior State wiretap application, and he was overheard on the wiretap. Neither item of information was included in the application for the Federal bug. The District Court sought to excuse this failure by finding as a fact that the Government neither knew Harvey was named nor overheard. 560 F.Supp. at 1068-73. The District Court also sought to avoid the impact of Section 2518(1)(e) by finding that the failure was "inadvertent." 560 F.Supp. at 1070. The fact of the State wiretap, albeit not Harvey's involvement in it, was included in page 21C of the applying agent's affidavit, prepared for submission to the court, but not found in the affidavit when it was unsealed. 560 F.Supp. at 1069-70. The text of page 21C is reprinted in 560 F.Supp. 1040. The Court found that there was "no evidence [in the record] that establish[ed] how page 21C came to be missing . . . ." 560 F.Supp. at 1070. As such, the omission could not be a violation of Section 2518(1)(e). The Court of Appeals, while conceding that the record[12] established that the Government agents "knew that Harvey had been intercepted," 789 F.2d at 1499, upheld the District Court's finding, as not clearly erroneous, that the agents "did not know that Harvey

[12]In fact, the agent's knowledge that Harvey was "an interceptee" was brought out "beyond question" by the interrogation of FBI agents by the District Court itself. (Vol.23 pp.1059-60 of Record).

was a named target . . ."[13] 789 F.2d at 1500. The Court went on to decide, moreover, that an inadvertent omission of material required to be disclosed by Section 2518(1)(e) does not require suppression, since it does "not relate to the legal determination the judge must make." *Id.*

Section 2518(1)(e), however, does not say that the Government had to "know" that Harvey was "named." It says "involved." If it is conceded that the Government "knew" he was "intercepted," he was "involved." As such, that fact had to be disclosed to the judicial officer if the applications were to be "full and complete." Similarly, "know" ought to be held to include not only "actual" knowledge, but "willful blindness." Surely, the Government ought to be held to the same standard of "knowledge" as drug traffickers. *See, e.g., United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc) (knowingly within §952(a) includes "willful blindness"). Section 2518(e), moreover, does not distinguish between "advertent" and "inadvertent" omissions. It places an unqualified duty on the Government to make a "full and complete" disclosure to the judicial officer of the known facts relating to previous applications. Even had page 21C been included in the

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[13]No appellate court ought lightly to set aside the findings of a lower court. But if the clearly erroneous rule is to have any meaning in the context of a motion to suppress, a "district court's account of the evidence . . . [that is not] plausible in light of the record viewed in its entirety . . . ," *Anderson v. City of Bessemer*, 105 S.Ct. 1504, 1512 (1985), ought not be "insulate[d] . . . from review by denominating . . . [it a] credibility determination [. . .]" *Id.* at 1512. If this petition merely represented a single instance of bad fact finding by a District Court and a misapplication of the clearly erroneous rule by a Court of Appeals, it might not merit this Court's attention. The fact finding and the appellate review here, however, took place in the context of a similar twisting of the law, and it represents a systemic problem in drug prosecutions. The police have a saying: "A little perjury goes a long way in a good cause." Here it might be appropriate to say: "If you let me find the facts and rewrite the law, civil liberties will never be violated." Harvey is prepared to demonstrate that the facts found below were clearly erroneous; he is also prepared to accept the facts as found and demonstrate that the law was wrongly interpreted and misapplied.

application, however, it would still have omitted that Harvey was involved in the State wiretap. Either way, the application was not "full and complete."

In any event, the District Court improperly placed the burden of going forward with evidence of why the paragraph was missing on Harvey in light of this Court's decision in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981). Once Harvey showed that page 21C was missing, the burden shifted to the Government to explain why. It did not. Recklessness should have been inferred, therefore, from an unexplained omission. *United States v. Martin*, 615 F.2d 318, 327-29 (5th Cir. 1980). "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devises." *Berger v. New York*, 388 U.S. 41, 63 (1967). Submitting an affidavit to a judicial officer for a bug without knowing that it is complete or not is recklessness in the classic sense of the term, factually and legally. *See Commonwealth v. Pierce*, 138 Mass. 165, 175-76 (1884) (Holme, J.) ("indifference to what . . . [the] consequences may be").

In addition, the holding of the Court of Appeals that an omission of known information required to be included by Section 2518(1)(e) does not warrant suppression places it squarely in conflict with *United States v. Bellosi*, 501 F.2d 833, 835 (D.C. Cir. 1974), a decision that the Court of Appeal avoided by dismissing it as "unpersuasive," 789 F.2d at 1500 n.6. In fact, *Bellosi*, and not the Court of Appeal's opinion, is persuasive. *See ABA Standards* at 137; *Wiretap Report* 68; *Carr* pp.187-88; *Goldsmith* p.43.

Finally, the fact of prior surveillance did relate to the necessity finding that the judicial officer had to make, despite the Court's observation that the prior State wiretap made the federal bug "neither more nor less necessary." 789 F.2d at 1500 n.6. As it will be more fully developed below, the existence of the State wiretap bore on the need to conduct *additional* surveillance. The judicial officer was entitled to information about Harvey's involvement in the State wiretap,

so that it could make a necessity judgment before the Federal bug was put in. Judicial officers in the first instance, not agents or appellate courts, must make the finding of need. *Illinois v. Gates*, 462 U.S. 213, 240 (1983). Indeed, not telling the judicial officer of the State wiretap and Harvey's involvement in it deprived him of the *opportunity* to request additional facts about it under 18 U.S.C. §2518(2). This Court must intervene and right these decisions if Section 2518(1)(e) is to regain the vitality it had when Congress enacted it in 1968.

3. *The Failure Of The Government To Reveal The Prior State Wiretap And The Trash Search Violated 18 U.S.C. §2518(1)(c).*

Under 18 U.S.C. §2518(1)(c), an application for a bug must include a "full and complete" statement about "other investigative" procedures. No requirement of a state of mind is set out. Harvey was named in the prior State wiretap, intercepted on it, and subjected to a trash search. None of this information was included in the Federal application. Harvey argued in the District Court, therefore, that an adequate showing of necessity had not been made.[14] The District Court passed over Harvey's argument on this point. The Court of Appeal responded to it in a footnote. 789 F.2d at 1500 n.6. The Court believed that Harvey was arguing that "*any* omission of a prior investigative effort required suppression." *Id.* Harvey contends, however, only that the text of the statute should be read to mean what it says: "full

[14]Harvey's argument in the District Court focused, not only on what had been omitted, but also on the form in which evidence had been presented to the judicial officer. In addition to setting out facts, the Government agents offered opinions to the judicial officer—as to the feasibility of various alternative courses of action. Harvey argued that an insufficient basis had been set out in the affidavits for the agents to offer such expert opinions. The point was rejected by the District Court and the Court of Appeal. 560 F.Supp. at 1055-57; 789 F.2d at 1496-98. This issue, too, may be fairly thought to be a subsidiary question raised in this petition on the point of necessity.

and complete." All information that is arguably relevant ("full") and not manifestly redundant ("complete") must be included. The State wiretap, Harvey's involvement in it, and the trash search were neither arguably irrelevant nor manifestly redundant. Each bore on the need for the *continuation* of an extraordinary investigative technique against Harvey. At a minimum, the judicial officer ought to have had the opportunity to evaluate whether or not normal investigative techniques used in light of what had been already obtained by the use of these other investigative techniques, *one of which was a wiretap*, could have accomplished the agents' objectives without *further* wiretapping or bugging. *See, e.g., United States v. Lilla*, 699 F.2d 99, 102-05 (2d Cir. 1983) ("use of the wiretap [must be more than] merely a useful additional tool"). Using the existing wiretap and the trash search materials in the context of grand jury interrogators under immunity grants might well have sufficed to accomplish the agents' objectives. The judicial officer needed to have at least this much information if he was to make an informed decision himself. Section 2518(1)(c), too, does not qualify its text by "known," as does Section 2518(1)(e), or "belief," as does Section 2518(1)(b). Some element of strict liability—necessity in fact—must have been intended. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (language included in one section, but omitted in another, reflects intent).

Language in this Court's opinions reflects a sensitive awareness of the importance of the showing of the exhaustion of alternative investigative methods. *Dalia v. United States*, 441 U.S. 238, 250 (1979) ("genuine need"); *United States v. Giordano*, 416 U.S. 505, 515 (1974) ("restraint . . . not to be routinely employed"); *United States v. Kahn*, 415 U.S. 143, 153 n.12 (1974) ("[N]ecessity [must be] shown . . ."). Unfortunately, the lower courts have tended to reduce this requirement to "one of investigative utility, rather than necessity." *Carr* at 179. *See also Wiretap Report* at 14 (Too "often [the requirement] has . . . been met by standardized

language . . . ."); *Goldsmith* at 127 ("boilerplate . . . the norm"). This Court has never decided an appeal on this important issue. This petition offers an excellent opportunity to this Court, therefore, to reinvigorate the original understanding of the 1968 Act on the point of necessity, which is at the heart of the rationale for the use of wiretapping and bugging.

4. *The Failure Of The Government To Reveal That Harvey Was Out Of Town Violated 18 U.S.C. §2518(1)(b).*

Under 18 U.S.C. §2518(1)(b), an application for a bug must include a "full and complete" statement of "belief" about "probable cause." [15] Harvey was out of town at the time the application was made on an unscheduled vacation; the Government had no idea of when he was to return. The application submitted to the judicial officer did not include this information in it, although it was noted in page 21C, which was not in the application, as noted above. Neither the District Court nor the Court of Appeals treated the failure to include page 21C in the application or the point of Harvey's absence from town as a separate statutory violation of the duty to make a "full and complete" statement of "belief" relating to "probable cause" under 18 U.S.C.

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[15]The District Court decided the issue of probable cause under the regime of *Aguilar v. State of Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969). 560 F.Supp. at 1050-53. The meaning of "probable cause" within the Fourth Amendment today is governed by *Illinois v. Gates*, 462 U.S. 213 (1983), which has been held to be retroactive. *Massachusetts v. Upton*, 104 S.Ct. 2085, 2087-89 (1984). Title III, however, governs here. Congress embodied *Aguilar-Spinelli* in it. S. Rep. No. 1097, 90th Cong. 1st Sess. 100-02 (1968). Until Congress indicates a change of mind, the old regime remains the law for wiretapping and bugging. *See Helvering v. Griffith*, 318 U.S. 317, 394-95 (1943). The Tenth Circuit has reserved decision on this issue. *United States v. Newman*, 733 F.2d 1395, 1399 (10th Cir. 1984). Other circuits are uncritically assuming that *Gates* applies under Title III. *See, e.g., United States v. Griffin*, 726 F.2d 852 (1st Cir. 1984). This issue, which was passed over in silence by the Court of

§2518(1)(b). Instead, each analyzed the issue as a constitutional matter under *Franks v. Delaware*, 438 U.S. 154 (1978). 560 F.Supp. at 1074-75; 789 F.2d at 1499. This petition will treat the constitutional issue subsequently. Here, as above on the question of the prior State wiretap and necessity, Harvey contends that the failure to include this crucial item of information of belief violated the plain language of Section 2518(1)(b). Here, too, an authoritive reading of Section 2518(1)(b) is needed.

5. *The Failure Of The Government Or The Supervising Judicial Officer To Stop The Listening After 21 Days of No Progress Violated 18 U.S.C. §2518(6).*

Under 18 U.S.C. §2518(6), an order for a bug "may require reports to be made . . . showing what progress has been made toward achievement of the authorized objective and the need for continued interception." S. Rep. No. 1097, 90th Cong., 2nd Sess. at 103-04 (1968) explained that the purpose of such reports was to check on "the need to conduct surveillance" and to "serve to insure that . . . [it] was not unthinkingly or automatically continued . . . ." The bug order

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(Footnote 15 Continued)

Appeals, 789 F.2d at 1498, also needs to be resolved, and it is raised in this petition. Its significance, moreover, is potentially fatal to the Government. If inadequate probable cause existed to justify listening for the non-drug predicate offenses under RICO, the bug will fall, for marijuana is *not* a drug for which RICO authorizes surveillance. The reasoning behind this contention is set out, but rejected, in *United States v. Bascaro*, 742 F.2d 1335, 1342-43 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 3476 (1985). The bug must then rest on the drug offenses alone. But the FBI agents, who conducted the listening, were *not* authorized to conduct drug investigations until February 3, 1982. *See* Fed. Register No. 23 p.4989. As of October 20, 1980, 28 C.F.R. §§ 0.85 and 0.100, together, assigned drug investigations *solely* to DEA, and 18 U.S.C. §2510(7) provides that only law enforcement agents empowered to conduct the investigations for offenses under surveillance may operate a bug. As such, the entire surveillance was not authorized by Title III.

was signed on October 20, 1980; an amended order was issued on October 22, 1980. Listening began on October 24, 1980. Progress reports were required at five day intervals. The first report was dated October 27, 1980; it did not indicate that listening had begun. The second report was dated October 29, 1980; it indicated that listening had begun, but that "no significant" conversations had been overheard from October 24th through October 28th. The supervising judicial officer was also informed that Harvey was "out of the South Florida area . . . [but he was] expected to return on October 29, 1980." The third progress report was dated November 4, 1980; it indicated that "[n]one of the persons named in the order were identified . . .", although conversations had been overheard; it also indicated that "the principals [had] been staying out of the South Florida area . . . [but were] expected . . . [to] return shortly." The fourth progress report was dated November 12, 1980; it reported no progress; it also indicated that it was the position of the Department of Justice in Washington that an extension of the order would be sought "only upon obtaining reliable information that the subjects . . . [were] back in town [and that] such information . . . [would] be available within several weeks." The fifth progress report was dated November 14, 1980; it indicated no conversations were overheard between November 11, 1980 and November 13, 1980.

Harvey argued in the District Court that the absence of progress—21 days out of a 30-day period—the "principals," (Harvey included) were out of town—"reliable information" of their return was "several weeks" away—no "significant" conversations had been obtained—mandated that the listening stop at the point of the fifth, if not the fourth, progress report. The District Court held that since the progress reports were discretionary, their sufficiency was a matter for the supervising judicial officer. 560 F.Supp. at 1054. In addition, it found Harvey's absence of no significance, since "[t]hree employees . . . were named as possible coconspirators, and they might well have had access to and

use of the office in Harvey's absence." 560 F.Supp. at 1074. The Court of Appeals agreed; it also held that the "proper time" to reconsider the probable cause "would be at the end of the thirty days . . . ." 784 F.2d at 1498. It also concluded that "there . . . [was] no factual basis in the record for . . . [Harvey's] contention that current probable cause did not exist." *Id.* at 1499 n.3.

The holdings of the District Court and the Court of Appeals that others might use Harvey's office in his absence to discuss criminal matters were without a factual basis in the affidavits; they were also wholly refuted by the progress reports themselves, as quoted above. Nor does the record support, as it is amply set out above, the Court of Appeal's incredible suggestion that "no factual basis" existed for Harvey's contention that current probable cause to justify the continuation of the listening no longer existed in light of progress reports that showed no progress. The holdings of the District Court and the Court of Appeals, both of which are legal in character, and neither of which are governed by the clearly erroneous standard, *Pullman Standard v. Swint*, 456 U.S. 273, 287 (1982), make a mockery of the text of the statute, its authoritive construction in its legislative history, and the record in this litigation. As a matter of interpretation of the law, they are inconsistent with *Howard v. State*, 51 Md. App. 46, 58, 442 A.2d 176, 188 (1982). They constitute, moreover, pernicious precedent that bodes ill for privacy, where extended surveillance is undertaken. The Third Circuit in *United States v. Cafero*, 473 F.2d 489, 495 (3rd Cir. 1973), *cert. denied*, 417 U.S. 918 (1974), the leading decision upholding the constitutionality of Title III against the objection of lengthy and unsupervised listening, conditioned its decision on a different reading of Title III:

> (1) The length of interception in each case [is to] be determined by judicial decision on a case by case basis; (2) the interception [must] be terminated automatically, not necessarily on a predetermined calendar date, . . . when the objective . . . is

> achieved . . . and (3) while there is a maximum statutory life span of thirty days for each approval order, each interception has the very real potential of earlier extension [under the progress report provisions.]

No aspect of this petition is more pressing than the need for this Court to breathe life into Title III's progress report system, from which these misguided lower court decisions have drained all vitality. *See Wiretap Report* at 96-97 ("check on the information previously presented to the judge, and as a deterrent to long surveillance"); *Carr* at 267 ("their purpose is not satisfied unless they are diligently reviewed"); *Goldsmith* at 136 ("should . . . [the] reports reveal the loss of probable cause, termination . . . would be required").

6. *The Failure Of The Government To Obtain Orders Of Approval For The Disclosure Of The Federal Bug And The State Wiretap Violated 18 U.S.C. §2517(5).*

Under 18 U.S.C. §2517(5) an "application" must be made for an order of approval to "disclose" a "wire or oral communication . . . relating to offenses other than those specified in the order of authorization . . . ." The bug order specified 18 U.S.C. §1962(c) and (d) and 21 U.S.C. §§ 841(a), 846. On February 9, 1982, Harvey was indicted on 21 U.S.C. §§ 848, 963, 952(a), 846 and 841(a)(1). No order of approval for the disclosure of the product of the Federal bug or the State wiretap was obtained to support the indictment returned under 21 U.S.C. §§ 848, 963, 952(a). In addition, an order of approval for the use of the State wiretap in the Federal trial was not obtained until the eve of trial, August 9, 1982. The District Court sought to avoid the impact of Section 2517(5) by holding that Section 848 was not an offense other than one specified in the Federal bug order and that it was, in any event, "impliedly" given by the granting of extensions. 560

F.Supp. at 1060-67.[16] The District Court rejected Harvey's objections to the State wiretap order of approval on the grounds of authorization, insufficiency, untimeliness, and lack of jurisdiction; it also held that a violation of Section 2517(5) did not warrant suppression. 560 F.Supp. at 1079-83. The Court of Appeals upheld the District Court, but it adopted only the implied approval theory. 789 F.2d at 1502-03. It also rejected Harvey's authorization, insufficiency, untimeliness, and lack of jurisdiction contentions in reference to the approval of the State wiretap without "extensive discussion." 789 F.2d at 1504-05. In particular, and without the benefit of a fact finding hearing and the submission of affidavits, it rejected Harvey's objection to the testimony before the grand jury of Darryl Falls, a witness identified in the State wiretap; it held that since his testimony came from personal knowledge, it was not the fruit of the wiretap. 789 F.2d at 1505.

The District Court and Court of Appeal's decisions flatly conflict with the text and legislative history of Section 2517(5). They are also inconsistent with *United States v. Brodson*, 528 F.2d 214, 216-17 (7th Cir. 1975) (surveillance under 18 U.S.C. §1955 (gambling business); approval required before trial under 18 U.S.C. §1084 (transmission of gambling information); *United States v. Marion*, 535 F.2d 697, 703-04 (2d Cir. 1976) (surveillance under State wiretap for State gun offense; approval required before trial under Federal gun offense); *State v. Mayes*, 284 Md. 625, 631-35, 399 A.2d 597,

[16]It may be useful here to call things by their right names. When courts use terms like "implicit" or "implied," they may be making an inference of fact or they may be using them as a fiction of policy. *See* L. Fuller, *Legal Fictions* (1967). As an inference of fact, the process involved in their use is, of course, as unobjectionable as the inference is supportable. But when matters are "implied" in statutes, Bentham's sharp structures become relevant. For him, such fictions were "wilfull falsehood[s] having for . . . [their] object the stealing of legislative power, by and for hands which could not, or durst not, openly claim it . . . ." I.J. Bentham, *Works* at 2443 (J. Browning, ed. 1843). He added, "Fiction of use to justice? Exactly as swindling is to trade." VII, *id.* at 283.

603-07 (1979) (similar); *State v. Kuchinsky*, 3 Kan. App. 2d 225, 229, 592 P.2d 144, 148 (Ct. of App. 1979). Title III, in short, envisions close judicial supervision of post-surveillance use, as this Court has come to require of grand jury disclosure. *See, e.g., United States v. Sells Engineering*, 463 U.S. 418, 427-35 (1983). Nothing in Title III envisions "implied" or "automatic" approval. Moreover, the Court of Appeals decision on Falls' testimony is radically inconsistent with *Gelbard v. United States*, 408 U.S. 41 (1972) (suppression of derivative illegal surveillance before a grand jury); *Harrison v. United States*, 392 U.S. 219, 225 n.12 (1968) (Government, not defendant, must establish lack of taint); *Wade v. United States*, 388 U.S. 226, 240 (1967) (independent source must be shown by clear and convincing evidence); and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.9 (1981) (argument alone cannot carry burden).

Here, too, it is time, after full briefing on the merits of each of the issues concerning the order of approval system, for this Court to breathe life back into provisions that have become a dead-letter in practice. As more wiretapping and bugging occurs, involving more people for longer periods of time, a greater need exists for close judicial supervision, not only before and during, but after, the basic period of listening. *Cf. Personal Privacy in An Informational Society* at 501 (1974) ("there must be a way for an individual to prevent information about him obtained for one purpose from being used . . . for other purposes . . . .") Until this Court intervenes, these provisions of the 1968 Act will remain lifeless. So, too, must the integrity of any fact finding process be upheld. *See Goldsmith* at 143-44, 150 ("courts . . . [have] declined to enforce the provision strictly"; "present practice is so loose that the statutory language is actually being disregarded"; "[i]f the constitutional and statutory protections against improper expansion of surveillance are to regain their vitality, the judiciary must begin to enforce them in a more conscientious manner.")

7. *The Government Failed To Follow The Judicial Officer's Minimization Instructions That Were Required By 18 U.S.C. 2518(5).*

Under 18 U.S.C. §2518(5), an "order" for a bug must "contain" a "provision" that listening shall be conducted . . . [so as] to minimize the interception" of "communications" not "subject to interception." The bug application promised:

> Monitoring . . . will immediately be suspended when it is determined through voice identification [and] surveillance . . . that none of the principals are participants in the conversations . . . To further protect . . . privacy . . . no monitoring . . . will occur unless a vehicle known to be occupied or driven by one of the principals is observed in proximity to the premises.

Based on this promise, the judicial officer so ordered the Government to minimize. The record, however, indicates that none of the agents were able to identify any of the principals' voices at the time of listening. No radio calls or other indications were received indicating if the principals were present. The agents knew Harvey and the other subjects were out of town. Surveillance was not conducted to determine if others were on the premises. The progress reports indicated that they were not in fact present. Listening continued. The District Court held, however, that agents acted properly. 560 F.Supp. at 1075-76. Similarly, the Court of Appeals placed "little weight" on the conceded deviation from the promise of the application. 789 F.2d at 1501. It also found the absence of progress of no consequence and it suggested that no evidence of a specific conversation that should not have been listened to was "produced." *Id.* at 1502. It, therefore, upheld the District Court's decision. *Id.*

Neither the District Court nor the Court of Appeals legal characterization of the record can be supported. Both are wrong. Neither, too, is subject to the clearly erroneous standard. *Inwood Laboratories, Inc. v. Ives Laboratories,*

456 U.S. 488, n.15 (1982). Harvey's argument is uncomplicated: As an independent matter of minimization, while the principals, including Harvey, were not known to be present, monitoring should have ceased. *See Katz v. United States*, 389 U.S. 347, 354 (1967). When it was affirmatively learned they were out of town, the bug should have been terminated by the judicial officer. *See Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976) (judicial officials must take care to assure that search and seizures minimize unjustifiable intrusions). Had it been terminated when it should have been—after the filing of the fourth progress report on November 12, 1980, which indicated that the "subjects" were not "in town" and that information of when they would be back would not be available for "several weeks," no monitoring would have occurred after that date until the judicial officer authorized it, after he was told that the subjects had returned. As such, the conversations that in fact occurred on November 18 and 19, 1980, would not have been obtained. The failure to minimize, as promised in the application, led, in short, to the obtaining of information that was used to justify the extension. *See* 789 F.2d at 1502 ("boosted" by the intercept of November 18th and 19th). As such, they and the subsequent overhears were unlawfully obtained. *See Kremen v. United States*, 353 U.S. 346 (1957) (unrestrained seizure warrants total suppression); *United States v. Giordano*, 416 U.S. 505, 529-33 (1974) (illegal information automatically taints extension).

8. *The Conduct Of The Government In Listening Lacked A Showing Of Present Probable Cause, Necessity, And Particularity, Which Are Required By The Fourth Amendment.*

Harvey's contentions in this petition rest, not only on statutory, but also on constitutional grounds. The Fourth Amendment requires a showing of "present probable cause." *Berger v. New York*, 388 U.S. 41, 59 (1967). It requires a showing of "exigent circumstances" before a surreptitious

invasion of privacy may be authorized. *Id.* at 60. Particularity —the basic notion behind the concept of minimization—is a mandate of the Constitution, not just Title III. *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976); *Katz v. United States*, 389 U.S. 347, 354 (1967). While this petition could be disposed of without reaching the constitutional questions, they are raised so as to cast in sharp relief the extent to which the District Court and the Court of Appeals have been unfaithful to the law. They have not merely transgressed their duty to uphold the 1968 Act; they have also failed to be faithful to the Constitution itself. If these provisions of the Fourth Amendment are to have life in this new era of extensive wiretapping and bugging in pursuit of the drug traffic, it will come about only through the active intervention of this Court to uphold constitutional values. Those in the front lines of this law enforcement war have tragically lost sight of their role of protecting civil liberties in times of great stress.

9. *The Failure Of The Government To Reveal To The Judicial Officer Issuing The Bug Order The Prior State Wiretap, The Trash Search, And Harvey's Absence Violated The Fourth Amendment.*

Here, too, what has been presented as a matter of the interpretation of Title III may also be recast in constitutional terms under *Franks v. Delaware*, 438 U.S. 154, 156 (1978). The key differences between the statutory arguments and the constitutional arguments must, however, be noted. *Franks* on its face only applies to false statements relating to probable cause. The requirement of Title III that applications be "full and complete" extends to omissions and showings of necessity. Little effort, however, is required to read *Franks* as applying to omissions. *See, e.g., United States v. Martin*, 615 F.2d 318, 327-29 (5th Cir. 1980). Similarly, it ought to be read to apply to necessity. *See, e.g., United States v. Ippolito*, 774 F.2d 1482, 1485 (9th Cir. 1985). Harvey has read Title III,

however, as also setting a higher standard for wiretapping and bugging than *Franks* requires for general search and seizure warrants, as *Franks* requires, at a minimum, a showing of recklessness. Harvey reads Title III as applying to both advertently and inadvertently inaccurate applications, as Title III's requirements of "full and complete" is not qualified by state of mind language. As above, here, too, this Court's intervention is required if the teachings of *Franks*, apart from Title III, are to be given life in the area of extensive wiretapping and bugging.

10. *Title III, As Interpreted And Applied, Authorizes Unreasonable Searches And Seizures, Which Are Prohibited By The Fourth Amendment.*

This Court has never passed on the constitutionality of Title III. Harvey candidly acknowledges that the Courts of Appeal and the State Supreme Courts that have passed on it have uniformly upheld its facial constitutionality in reliance on this Court's opinions in *Katz v. United States*, 389 U.S. 347 (1967) and *Berger v. New York*, 388 U.S. 41 (1967). The cases are collected in *Carr* at 33. *Goldsmith*, at 55, however, rightly observes: "The real question today . . . is not Title III's facial validity, but the manner in which it has been applied." Harvey is prepared in a brief on the merits to argue that Title III has been so misinterpreted and misapplied generally, but in this case in particular, that it is, if not facially, at least as applied, no longer a statute authorizing only the reasonable search and seizure of the people. Senator John L. McClellan, the chief sponsor of Title III, observed in the 1968 debates:

> If we cannot trust the courts and our officials to enforce and obey the laws, then there is no redemption for America * * * We have to have courts, and we have to be able to rely on courts.

114 Cong. Rec. 12284 (1968). Sadly, little of what was done by the Government, the supervising judicial officer, the District Court, or the Court of Appeals in this litigation complied with a right-reading of applicable constitutional or statutory safeguards. Lamentably, this petition presents to this Court an unfortunately all too common example of a bug that was unnecessary, unjustified, heedlessly executed, and obtained by a process in which Government agents were in fact less than candid with the issuing judicial officer or the District Court; it is also a prosecution where the District Court and the Court of Appeals twisted both the record and the law to uphold the actions of the Government. This Court ought not let this opportunity pass to call to task those who enforce the law with the law itself. Mr. Justice Brandeis in his classic dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) rightly observed: "Our Government is the potent, the omni present teacher. For good or for ill, it teaches the whole people by its example." Lawless law enforcement will not only not rid our people of the drug traffic, it will leave us, not only cursed with drugs, but a lawless people. As Mr. Justice Frankfurter, a Justice, not a sentimentalist about crime or criminals, observed in *On Lee v. United States*, 343 U.S. 747, 758-62 (1952):

> Loose talk about war against crime too easily infuses the Administration of Justice with the psychology and morals of war. It is hardly conducive to the soundest employment of the judicial process * * * Few sociological generalizations are more valid than that lawlessness begets lawlessness. * * * Such encouragement to lazy immoral conduct by the police does not bode well for effective law enforcement. Nor will crime be checked by such means.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to the Court of Appeals for the Eleventh Circuit.

Dated: August 27, 1986

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that each party required to be served has been served and specifically that I caused three (3) true and correct copies of the Petition for Writ of Certiorari and three copies of the Appendix to the Petition for Writ of Certiorari to be placed in a container addressed to the Solicitor General of the United States, Department of Justice, 10th & Constitution Avenue, N.W., Washington, D.C, 20530, with sufficient United States Post Office first class postage prepaid and caused said container to be deposited in a United States mailbox in Miami, Florida 33137, on this 27th day of August, 1986.

JAMES J. HOGAN